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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DONALD L. GAMACHE, Plaintiff and Appellant, v. AMY RYPINS, Defendant and Respondent.	D059155 (Super. Ct. No. 37-2009-00054423-CU-CO-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Reversed.

Plaintiff and appellant Donald L. Gamache, as executor representing the estate of his deceased mother Catherine Gamache (Appellant; sometimes Mother), appeals a judgment dismissing all the breach of fiduciary duty and related claims that she brought against defendant Amy Rypins (Respondent), a licensed attorney who had performed legal services for Mother, as arranged by one of her adult daughters, fellow defendant Diane Steuer (Steuer; not a party to this appeal). The complaint was dismissed as a

terminating discovery sanction, based on findings of Appellant's noncompliance with discovery orders. (Code Civ. Proc.,[1] § 2023.010 et seq.)

In the complaint filed in May 2009, Appellant (then age 87 and living with her other daughter, Lois Gabriel [not a party to this appeal]) alleged that Steuer had committed elder abuse of various physical and financial types. (Welf. & Inst. Code, § 15610.27.) As against Respondent, Appellant claimed that the estate planning legal services she performed for her in 2003 and later, at the request of Steuer, were contrary to Appellant's actual wishes and amounted to Respondent's breaches of fiduciary duties and commission of fraudulent and tortious conduct.

After Respondent served discovery in January 2010, Mother's health continued to deteriorate and major discovery disputes arose. During the proceedings from March to November 2010 on Respondent's discovery motions, the trial court was made aware that Mother was participating in an ongoing related probate dispute over a family trust, that a guardian ad litem had been appointed for her in that matter, and that a probate conservatorship was being considered. (*In re Gamache Trust* (Super Ct. San Diego County, 2009, No. 37-2009-00150645-PR-TR-NC) (the probate action).) At a July 2010 case management conference in this case, by stipulation of the parties based upon their questions about Mother's ability to participate in litigation in any meaningful way, the trial court appointed her the same guardian ad litem as in the probate case, Attorney Ira Carlin. (§§ 372; 373, subd. (c).)

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1 All further statutory references are to the Code of Civil Procedure unless otherwise noted.

From March to April 2010, some further discovery compliance was accomplished by Appellant, in response to several court rulings on Respondent's numerous discovery motions. On September 10, 2010, when Appellant was already known to be gravely ill, in hospice care and unresponsive, the trial court ordered that a further deposition session be held September 27, 2010, and unsuccessful efforts to do so at her care facility were pursued. She died in October 2010 (age 88). The same day, Respondent filed her third motion for terminating sanctions, and it was granted in November 2010, dismissing all of Appellant's surviving claims against Respondent, but denying the request by Steuer to join in the motion. Through her special administrator, Appellant has appealed the judgment of dismissal.[2]

On appeal, Appellant asserts the trial court abused its discretion in terminating the claims against Respondent as a discovery sanction because (1) Appellant did not willfully fail to comply with court orders to participate in further deposition sessions, but was unable to do so because of her worsening medical condition; and (2) the orders represented a misinterpretation of the governing statutory law, by failing to require the filing of a subsequent motion to compel discovery, and/or the orders are not supported by the evidence.

We do not seek to determine whether the trial court should have imposed different discovery sanctions, but instead ask whether the court abused its discretion by imposing

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[2] A related probate case was filed after Appellant's death in Orange County. (*In re Estate of Gamache,* Super. Ct. Orange County, 2010, No. 30-2010-00416863-PR-PW-LJC.)

the sanctions it did. (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1620 (*Collisson*); *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1245 (*Lang*).) On the entire record, including the previous orders issued by the trial court to enable discovery to be pursued and to ensure the participation of a guardian ad litem, this combination of unfortunate circumstances did not demonstrate such willful noncompliance with discovery by Appellant as would justify an exercise of discretion to terminate the case. The order imposing terminating sanctions will be reversed for the trial court to conduct such appropriate further proceedings as will take into account the current status of the claims and parties. (§ 377.20 et seq [survival of claims].)

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint; Initial Discovery Motions

Until March 2009, Mother lived with her daughter Steuer. She then came to live with her daughter Gabriel, because they were alleging elder abuse had occurred by Steuer, who was said to be taking Mother's property and making estate plans with it in her own favor, as assisted by Respondent in 2003 and later. The complaint was filed May 5, 2009, alleging numerous elder abuse-type causes of action against not only Steuer but also against Respondent, and against two medical doctors who had allegedly libelously questioned whether Mother lacked "the physical and mental ability to handle her personal and financial affairs at this time [March 2009]."[3]

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3 In a prior opinion, this court upheld dismissals of the other defendants in this case, the two doctors who prepared declarations about Mother's mental condition. (*Gabriel v. Souza* (March 30, 2011, D056557).)

The complaint seeks compensatory and punitive damages against Respondent on theories of elder abuse, fraud, declaratory relief, intentional misrepresentation, and breach of fiduciary duty. In October 2009, Respondent answered the complaint and served discovery requests, including form and special interrogatories. Mother fell and broke her hip in October 2009 and was subsequently bedridden and taking pain medication.

Meanwhile, the family members were litigating disputes over Mother's personal trust in the probate case, pursuant to a petition for instructions filed by Steuer in December 2009. (Prob. Code, § 1043.) On February 11, 2010, Appellant personally verified a lengthy declaration in objection to the petition. In May 2010, the probate court appointed the guardian ad litem for Mother, Attorney Carlin, and was also considering whether it would be appropriate to appoint a conservator for her. This record does not indicate that any such probate conservatorship appointment was ever made.

In the case before us, the following sequence of discovery took place. In January 2010, Respondent brought motions to compel further responses to both form and special interrogatories, and a hearing was set for March 12, 2010. Over Appellant's opposition, the court issued a ruling ordering further answers to be supplied to the designated form and special interrogatories, "to the best of [her] ability," within 20 days of the ruling. The court declined to award sanctions at that time.

On March 31, 2010, Appellant personally verified her further answers, which were served by the designated date.

A few days before the further answers were provided, the trial court granted Respondent's separate motion to compel Mother to appear for her deposition, on the basis

that Respondent had served four notices of taking deposition, but she had responded simply by claiming ill health, and without making proper objections or seeking a protective order. This March 26, 2010 order granting the motion to compel also allowed Appellant to seek a protective order, based on medical certification, if she sought to limit the length of her deposition to two hours. She was then deposed in two short sessions on April 7 and April 21, 2010 for three hours total, and that transcript is over 150 pages and shows she had some memory loss about the events described in the complaint. The parties exchanged dates to set a third session in May, but negotiations fell apart, with each side blaming the other.

B. First Two Motions for Terminating Sanctions; Appointment of Guardian Ad Litem

On June 4, 2010, Respondent brought her first motion for terminating sanctions or, in the alternative, issue preclusion or evidentiary sanctions. Respondent claimed further discovery was necessary but was being resisted, in that Appellant had not supplied enough information about important issues in the case, i.e., her damages in the form of attorney fees, or loss of use of her home that had allegedly been taken over by Steuer, or information about what Respondent told Appellant about dividing her property. Respondent sought testimony about the nature of instructions Mother had given to Respondent, in connection with the estate planning sessions arranged by Steuer. Appellant filed opposition in May 2010 describing how her medical condition was deteriorating. Respondent suggested that she obtain a guardian ad litem.

At the June 2010 motion hearing, the trial court was awaiting further developments in the probate case, concerning those proposals to appoint a conservator.

The court denied Respondent's first motion for terminating sanctions, without prejudice, ruling there had been an insufficient showing of willful failure to obey a court order. The trial court noted that Respondent's pending request for appointment of a guardian ad litem in the civil case was inconsistent with her accusation of willful disobedience by Appellant. Monetary sanctions were denied and the court stated that the matter would continue in due course. Respondent again proposed the appointment of a guardian ad litem on the basis that Mother was not cooperating with discovery.

On July 2, 2010, at the case management conference, the parties stipulated that Attorney Carlin would be appointed as guardian ad litem for Appellant. (§§ 372; 373, subd. (c).) The formal order was signed July 13, 2010. The guardian ad litem visited Appellant at her care facility on July 16, 2010 and sent a letter to all counsel, reporting that the state of her health would not permit her to be subjected to a deposition or court proceeding, because she was unable to sustain a conversation, and her attending physician stated to him that Appellant was declining slowly and was in hospice care.

On July 16, 2010, Respondent sent a fifth notice of taking another deposition session for Appellant, soon followed by notices 6, 7, and 8, ultimately establishing another deposition date of September 27, 2010. On August 18, Respondent obtained an ex parte order setting a briefing schedule for her second motion for terminating or issue preclusion sanctions, to be heard September 10, 2010. Steuer joined in the motion on the ground that Appellant had not made herself available for any meaningful deposition.

Appellant filed opposition arguing that there was no need for her to obtain a medical certification or doctor's letter unless there was an issue related to the length of

the deposition, which there was not. However, Appellant supplied to the court a "To Whom It May Concern" letter from the attending physician, Dr. Maria Teresa Agner, dated August 25, 2010, stating that Appellant was in poor medical condition, on hospice, and was not presently able to give deposition in any reasonable form in legal proceedings.

At the September 10 motion hearing, Respondent argued that the deposition session was still necessary because otherwise, Respondent might file a summary judgment motion and Appellant might then engage in gamesmanship by belatedly supplying a personal declaration from Appellant, even though she had not supplied a doctor's declaration. Respondent also argued the supplemental interrogatory answers were inadequate. Appellant's attorney responded that she was not incompetent, but too sick to be deposed.

At the hearing, the court indicated that the "To Whom It May Concern" doctor's letter was not enough proof of Appellant's mental state, and required Appellant's counsel to obtain a further declaration of incompetency from a medical source, to preclude the necessity for another deposition session that would demonstrate such incompetency. The court asked why no protective order had been sought nor any stipulation reached about how Appellant could not submit a declaration because of her health. The court commented that the guardian ad litem appointment was not solving the problem, suggested that the matter could have been stayed pending the outcome of the probate issues, and then ordered that Respondent would be allowed to take Appellant's deposition in the hospice care facility within 21 days. Her failure to participate could then be

considered to be grounds to preclude introduction of a later declaration from her, without further excuse or medical information.

The resulting minute order from September 10, 2010 denied the motion for sanctions and ordered that Appellant's deposition would be allowed in hospice care within 21 days. The court also found no failure to obey a court order had occurred up to that point, because Appellant "had complied, if only minimally, with the court's orders to date." The court noted that the guardian ad litem had been appointed because the parties stipulated that Appellant "is not currently competent." Two conflicting formal orders were prepared, one dated September 16, 2010, merely stating that appellant "shall be" deposed within 21 days. However, the second order, dated October 5, 2010, stated that Respondent "may take" the deposition within 21 days of the ruling. Appellant's attorney suggested that Respondent draft the desired doctor's declaration, and offered a stipulation that no party declaration would be offered, but no agreements were reached.

The guardian ad litem served notice that he would be on vacation in Europe, effective September 7 through 24, 2010. During his absence, his office staff attempted to arrange a continuance of the deposition at Appellant's request, but was unsuccessful. On the scheduled deposition date of September 27, 2010, all counsel arrived at Appellant's care facility and learned that it was not possible, as planned, to make her available in a business office, because some of the family did not want her to be taken out of her bed and she could not be deposed in her room, because of the presence of her roommates. Respondent attempted to call the trial judge about the logistical problems but could not get through.

The transcript of this unsuccessful deposition setting includes comments by the guardian ad litem that he had been out of contact until the previous weekend, learned of this only recently, and regretted he had been unable to participate in the process of working out the deposition, but was hopeful that the matter could be resolved. Counsel for plaintiff added that the attending physician was on vacation and would not return until early October.

C. *Third Motion for Terminating Sanctions; Order of Dismissal*

On October 14, 2010, Respondent filed her third motion for various kinds of sanctions, including issue, evidentiary, monetary and terminating sanctions. Appellant died the same day, and her attorney requested that the motion be taken off calendar until an appropriate representative could be appointed. Respondent refused. In her filed opposition, Appellant claimed she had attempted to arrange a third May 2010 deposition session but had been rebuffed, and she alleged that a stipulation had been proposed not to offer her personal declaration, without success.

At argument on the motion on November 5, 2010, counsel for Steuer attempted to join in the motion (denied) and reminded the court that there were pending probate matters not only in San Diego but also in Orange County. The trial court told counsel that he had made many efforts to avoid dismissal, but Appellant's counsel had failed to cooperate by getting a declaration from a doctor. Appellant made another request for a continuance to allow the probate court to appoint a special administrator who would be substituted into this action, which was denied.

The court's minute order granted terminating sanctions in favor of Respondent, stating that Appellant had failed to comply with at least three court orders compelling discovery, and had failed to attend her properly noticed deposition. The court set a status conference to evaluate the status of the case against Steuer, after Appellant's death. The court released the guardian ad litem from service, and stated he had not done anything wrong. This appeal of the judgment of dismissal followed.

DISCUSSION

We first outline the applicable standards for review of an order imposing terminating sanctions, under this statutory scheme. We then examine the various factors considered by the trial court, in light of applicable authorities in this context.

I

DISCOVERY SANCTIONS

"Section 2023.030 authorizes a trial court to impose monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions against 'anyone engaging in conduct that is a misuse of the discovery process.' " (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991 (*Doppes*).) The trial court is afforded broad discretion in selecting discovery sanctions, "subject to reversal only for abuse." (*Id*. at p. 992.)

Section 2023.010, subdivisions (d) and (g) define misuses of the discovery process as including, among others, "(d) *Failing to respond or to submit to an authorized method of discovery*. [¶] (g) *Disobeying a court order to provide discovery*." (Italics added.) Section 2025.450 authorizes motions to be filed to seek the imposition of varying degrees

of discovery sanctions upon a party that fails to comply with a deposition notice, such as an order compelling such compliance.

" ' "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be wilful [citation]." [Citation.]' [Citation.]" (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; see § 2023.010 [utilizing alternative "misuse" terminology].)

In contemplating the imposition of a terminating sanction, a trial court generally engages in a "balancing process" (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 214), taking into account the nature of the discovery abuse, whether it was part of a pattern, and whether it was " 'willful' and 'without substantial justification.' " (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 224-225.) The court evaluates whether lesser sanctions would be effective to produce the discovery sought, the extent of the prejudice to the other party, and whether the sanction would result in a "windfall" to the other party. (*McGinty*, *supra*, at p. 214; *Lang*, *supra*, 77 Cal.App.4th 1225, 1246 [trial courts impose a terminating sanction after considering the "totality of the circumstances: conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery"].)

It is inappropriate to utilize sanctions for misuse of the discovery process as punishment, as the goal should instead be to remedy the harm caused by any withheld

discovery. (*Doppes, supra,* 174 Cal.App.4th 967, 991-992.) "[T]he unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction . . . ." (*Scherrer v. Plaza Marina Coml. Corp.* (1971) 16 Cal.App.3d 520, 524 [interpreting prior but similar versions of discovery statutes].) It is generally recognized that "terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (*R. S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.)

II

ISSUES PRESENTED; ANALYSIS

Appellant claims she did not willfully fail to comply with the court orders to provide further answers to interrogatories or to appear for further deposition sessions, either because she provided some answers or because she was unable to do more, due to her medical condition. She further argues the trial court should have required another separate motion to compel such discovery, pursuant to section 2025.450 (providing that a motion for an order compelling compliance with a deposition notice may be filed following the failure to comply). Ultimately, she claims the order was an abuse of discretion because it is not supported by all of the evidence.

A. Relevant Circumstances

To analyze Appellant's claims, we evaluate the entire sequence of events in light of the above stated standards. The record shows that these disputes took place in the context of a companion probate action involving the same parties, leading to a stipulated

order at the civil case management conference that a guardian ad litem for Mother should be appointed in this civil action, as had been done in probate. (§ 373, subd. (c).)

Once the trial court appointed the guardian ad litem when the need for one was brought to the court's attention, and on stipulation by the parties, the guardian ad litem had certain duties to perform. (See *In re Marriage of Caballero* (1994) 27 Cal.App.4th 1139, 1149; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 75, p. 136.) This statutory procedure has been characterized as mandatory when the criteria for an appointment are met, and it expresses an important public policy of protecting qualifying litigants. (*Id.* at § 84, p. 146.)

In *De Los Santos v. Superior Court* (1980) 27 Cal.3d 677, 684, the Supreme Court stated the guardian ad litem has "sweeping" powers in the conduct of the case: "The guardian ad litem is an officer of the court, and he has the right to control the lawsuit on the [minor/incompetent's] behalf. Among his powers are the right to compromise or settle the action [citation], to control the procedural steps incident to the conduct of the litigation [citation], and, with the approval of the court, to make [binding] stipulations or concessions that . . . are not prejudicial to the [client's] interests [citation]." (See *Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1501 (*Regency Health*) ["[S]ection 372 makes no distinction between parties who are legally incompetent due to minority and those who are legally incompetent due to mental defect."].)

However, the guardian ad litem's duties are not equivalent to those of an attorney or a conservator: "[A] guardian ad litem's role is more than an attorney's but less than a

party's. The guardian may make tactical and even fundamental decisions affecting the litigation but always with the interest of the guardian's charge in mind. Specifically, the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit." (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454; 4 Witkin, Cal. Procedure, *supra*, § 78, p. 138.)

In pursuit of litigation, a guardian ad litem, "subject to the court's ultimate supervision, has the authority and the duty to facilitate compliance with the ward's discovery obligations." (4 Witkin, Cal. Procedure, *supra,* § 78, p. 139, citing *Regency Health*, *supra*, 64 Cal.App.4th 1496, 1504.)

Neither party argues error in terms of the guardian's appointment or his role in participating in the case, although Respondent faults the guardian ad litem for not assisting in the discovery process more extensively, or "dodging" discovery. In addressing the arguments on appeal, we cannot disregard these circumstances of the participation of the guardian ad litem, when evaluating the trial court's exercise of discretion in applying this statutory scheme to the record. The appointment is also relevant for evaluating the nature of Appellant's conduct, and whether it amounted to a pattern of discovery abuse that was willful and without substantial justification.

Here, the court's minute order granting terminating sanctions stated that Appellant had failed to comply with at least three court orders compelling discovery, and had failed to attend her properly noticed deposition, all while still represented by the guardian ad litem. Respondent repeatedly contends that four such orders were inexcusably

disobeyed. We next examine the status of Appellant's compliance with the outstanding discovery orders.

B. Responses to Interrogatories

In the minute order dated September 10, 2010, the court denied the second motion for terminating sanctions and ordered that Appellant's deposition would be allowed in hospice care within 21 days. However, the court also ruled there had been no failure to obey a court order to that point, because Appellant "had complied, if only minimally, with the Court's orders to date," and a guardian ad litem had been appointed because the parties stipulated that Appellant "is not currently competent." At that time, Appellant had already supplied further answers to the interrogatories in March 2010, apparently "to the best of her ability," and the trial court impliedly acknowledged those were the terms of its previous order.

Accordingly, Respondent cannot establish sufficient support in this record for her contention that the interrogatory compliance remained seriously deficient, nor that those orders were willfully disobeyed so as to justify dismissal of the case.

C. Arguments About Extent of Deposition Compliance

At the time the September 10, 2010 minute order was issued, ordering Appellant to be deposed at the hospice within 21 days, Appellant had already sat for two sessions in April 2010, and the transcript is over 150 pages in length. This can reasonably be interpreted as some compliance with the March 26, 2010 order, even if it was only "minimal," as the trial court seems to acknowledge.

We next reject Appellant's argument on appeal that the September 2010 order was only permissive ("may" be deposed), not mandatory ("shall be" deposed). That position is inconsistent with the previous order of March 26, 2010, that provided Appellant's deposition shall take place as requested; two sessions were conducted, and one more anticipated. Unfortunately, the two formal orders denying the second motion for terminating sanctions are somewhat inconsistent, about whether appellant "shall be" deposed (Sept. 16, 2010), or whether Respondent "may take" the deposition (Oct. 5, 2010 order). Even so, Appellant cannot disregard the March 26 order, and the September 10 order is not merely permissive in its terms, however it is parsed.

We likewise reject Appellant's position that the statutory scheme (§ 2025.450) required the trial court to schedule yet another motion to compel discovery, either after the April deposition sessions were held, or after the September 10 ruling confirmed and renewed the previous order to be deposed, from March 26, 2010. This would not have been a correct application of the statutory scheme, because the court and the parties were already engaged in an ongoing effort to implement existing orders. No separate, additional motion procedure was reasonably necessary to give Appellant adequate notice that further deposition was being sought.

However, it is not disputed that the September 2010 deposition effort at the hospice facility was not completed, which leads us to the remaining issue, whether the trial court exercised its discretion appropriately in granting the motion for terminating sanctions in November 2010.

D. Analysis

In Respondent's third motion for sanctions, not only a dismissal order but also issue, evidentiary and monetary sanctions were sought. The trial court faced with such a motion "should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should ' "attempt [ ] to tailor the sanction to the harm caused by the withheld discovery." ' [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment." (*Doppes, supra*, 174 Cal.App.4th 967, 992.)

Although the court's order granting terminating sanctions stated that Appellant had failed to comply with at least three court orders compelling discovery, we have identified only two, regarding attendance at deposition (since the trial court apparently did not believe that the two interrogatory orders were still at issue). The court's dismissal order was apparently responding to the failed September 2010 deposition effort, and to Appellant's failure to obtain a formal protective order or a formal medical certification of incompetency. Understandably, the trial court was at a loss to understand why Appellant never sought a protective order, after the March 26, 2010 hearing. Appellant claims that such an order would have only been necessary to control the length of the sessions, which was no longer an issue, so her attorney supplied only minimal documentation of her state of health. We think Appellant is completely unjustified in claiming that the March 26 order is ambiguous regarding the need for medical certification for only a reduced session length, since her inability to participate likewise required appropriate proof.

Despite these problems, other relevant factors persuade us that in this ruling, the trial court exalted form over substance and abused its discretion by terminating Appellant's action. The appropriate goal in resolving a motion for discovery sanctions must be to make an informed, discretionary selection among the available options, based upon the pending requests and the history of the case, that will curb the particular form of discovery misuse that is occurring. (*Doppes*, *supra*, 174 Cal.App.4th 967, 992 [incrementally harsher sanctions proper in response to continuing misuses of the discovery process].) By the summer of 2010, all parties and the court knew the guardian ad litem had personally evaluated Mother's health and mental condition as poor and declining in July 2010, and her doctor then supplied an apparently authentic letter stating that she was in hospice and unable to participate in litigation as of late August 2010, which was brought to the court's attention.

Earlier, the transcripts of the April 2010 deposition sessions had shown that Appellant was already unable to produce requested information about her prospective damages or her memory of the estate planning sessions with Respondent. It is therefore unpersuasive for Respondent to point to the verification Appellant signed for her February 2010 probate case declaration, as proving that she wrongfully withheld discovery later that year (May through Sept.). Appellant could not carry on a conversation in July 2010 and was in a comatose state as of September 2010. The record does not indicate any realistic possibility that after May 2010, Appellant would have had any personal ability to supply such information at deposition. As of September, the trial

court made a finding that Appellant had "minimally" complied with previous discovery orders.

We observe that Respondent was extremely aggressively litigating and opposing the claims by Appellant that her legal services were substandard or fraudulent, which is somewhat understandable, given the challenges to her professional reputation. It is also understandable that the trial court was frustrated and disappointed in the apparent obstinacy of Appellant's counsel in failing to provide more complete documentation about her failing health and reported inability to participate in further discovery, essentially after the May 2010 sessions fell through, and while the companion probate action was proceeding. Even so, Appellant's conduct in failing to be deposed at the further session in September 2010, while in hospice care and comatose, was not shown to be, as a matter of law or fact, a "misuse" of the discovery process that lacked any substantial justification.

Respondent now claims that the guardian ad litem acted together with Appellant's counsel to "dodge" the requested discovery. The record does not support that contention. At the September 2010 hearing, the court acknowledged that the July 2010 appointment of the guardian ad litem had been accomplished pursuant to stipulation, due to the ongoing questions about her ability to further comply with any discovery at that time. A guardian ad litem is subject to the court's ultimate supervision, and has the duty to facilitate compliance with legitimate discovery obligations. (*Regency Health, supra*, 64 Cal.App.4th 1496, 1504.) The court made a finding in November that the guardian ad litem did not commit any misconduct.

This record nevertheless discloses that the trial court failed to implement in any effective manner its previous order that enabled the participation of the guardian ad litem in the matter, for assistance of the court and all of the parties, to reach a just result. Even though the guardian unfortunately made himself unavailable during most of the month of September 2010, the guardian still had an important, court-appointed role to fulfill in protecting the interests of Appellant when she was unable to do so. This guardian ad litem was not available at the critical times, but the record does not demonstrate how or whether the trial court took that existing factor into account in addressing the escalating discovery problems. The fact that counsel for Appellant and Respondent were not able to cooperate with each other did not obviate the need for the trial court to allow for potential involvement of the appointed guardian ad litem, once he returned, in light of the public policy justifying the appointment in the first place.

The "incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination," requires that " '[d]iscovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." ' [Citation.]" (*Doppes, supra,* 174 Cal.App.4th 967, 992.) Although the problem of a last minute declaration potentially being produced by Appellant, to oppose a forthcoming summary judgment motion (if one was ever filed), was a serious one, other approaches, such as evidentiary or issue preclusion orders, were sought in the moving papers and were available to foreclose any such eventuality. Although discovery sanctions are not justified as punitive measures, these sanctions orders as a whole were

punitive in nature. It was an exercise in futility for the trial court to require Appellant to undergo the third deposition session at the latter part of her life in hospice, merely to enable Respondent to make her record that Appellant was not currently participating in discovery, and then to use that as justification for dismissal.

We do not dictate the manner in which the court's discretion should be exercised in awarding discovery sanctions. (See *Lang*, *supra*, 77 Cal.App.4th at pp. 1245-1246; *Collisson*, *supra*, 21 Cal.App.4th 1611, 1620.) However, this record does not reflect the entirely purposeful, extensive pattern of misuse of discovery on Appellant's part that would have justified this terminating sanction. Even though the trial court was well advised of the companion probate matter and the need for a guardian ad litem in both matters, it failed to exercise its discretion at the final hearing in a way that would have appropriately adapted the discovery orders and the required compliance with them to the totality of the changing circumstances of Appellant's health, her date of death, the nature of the claims, the request for appointment of an appropriate representative to pursue her surviving claims, and the extent of availability of the appointed guardian ad litem to assist the court in resolving the disputed issues.

DISPOSITION

The judgment of dismissal is reversed with directions to the trial court to allow such further proceedings as will enable the parties to make any appropriate factual and legal showings that may still be developed, to pursue available discovery in light of the rules regarding survival of any appropriate claims against Respondent. All parties shall bear their own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.